No. 79-2006

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG, *Petitioners,*

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT, *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

### A.

Can an employee maintain an action under FLSA for wages after he has submitted a claim for wages based on the same facts to a grievance committee pursuant to the collective bargaining agreement and had the claim denied when a subsequent review of the grievance proceedings by a federal court finds the employee was fairly represented?

### B.

Does an employee's failure to comply with the requirements of 29 U.S.C. §216(b) and 29 U.S.C. §256 bar an action under FLSA?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii, iv, v |
| STATEMENT OF THE CASE | 1 |
| Summary Of Argument | 2 |
| Argument | |
| A. The Decision Below Properly Reflects The Federal Labor Policy Of Encouraging Labor Peace By Enforcing Arbitration Provisions Of Collective Bargaining Agreement | 3 |
| B. The FLSA Claim Of The Employees Is Barred And Is Not Properly Before The Court Because Of The Failure Of The Employees To Comply With The Requirements Of The 29 U.S.C. §216(b) and 29 U.S.C. §256 | 21 |
| CONCLUSION | 25 |


## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) | 13, 14, 17 |
| *Atterburg* v. *Anchor Motor Freight Inc.*, 425 F. Supp. 841 (D.N.J. 1977) | 17 |
| *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F.2d 1194 (1980) | 19 |
| *Beckley* v. *Tessier*, 332 F.2d 495 (9th Cir. 1964) | 7 |
| *Burrell* v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951) | 22 |
| *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d (3rd Cir. 1943) | 4, 8 |
| *Employees of Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614 | 14 |
| *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948) | 5 |


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**Table of Authorities Continued**


CASES: PAGE

*Grosheck* v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977) ..... 23

*International Longshoreman's Association* v. *Sea Land Services*, 430 F. Supp. 282 (P.R. 1975) ..... 16

*Kulik* v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (Ed.Ill. 1962) ..... 24

*LaChapelle* v. *Owens, Illinois*, 513 F.2d 286, 288 (5th Cir. 1975) ..... 23

*Leone* v. *Mobil Oil Co.*, 523 F.2d 1153 (D.C. Cir. 1975)... 19

*Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965) ..... 8, 9, 13, 14, 16

*Satterwhite* v. *United Postal Service, Inc.*, 496 F.2d 448 (10th Cir. 1974)..... 14, 16, 17, 19, 21

*Sims, et al* v. *Parke Davis Company*, 453 F.2d 259 (6th Cir. 1971) *cert. den.* 405 U.S. 978 (1972)..... 24

*Tennessee Coal Iron R.R. Co.* v. *Muscoda Local No. 123*, U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944) ..... 18, 19, 20, 21

*Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912 (1957) ..... 6

*Union de Tronquistos de Puerto Rico, Local 901* v. *Flagship Hotel, Corp.*, 554 F.2d 8 (1st Cir. 1977)..... 17

*U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971)..... 2, 10, 11, 12, 13

*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 ..... 6

*United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960)..... 6

*United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 ..... 6

## Table of Authorities Continued


| STATUTES AND REGULATIONS: | PAGE |
|---|---|
| National Labor Relations Act | |
| 29 U.S.C. §173(d) | 3 |
| Fair Labor Standards Act | |
| 29 U.S.C. §206(b) | 20 |
| 29 U.S.C. §216(b) | 3, 21, 23, 24 |
| 29 U.S.C. §254 | 20 |
| 29 U.S.C. §256 | 3, 21, 22, 23, 24 |
| Interstate Commerce Act | |
| 49 U.S.C. §304 | 19 |
| Federal Motor Carrier Safety Regulations | |
| 49 C.F.R. §390, et seq | 18 |
| 49 C.F.R. §392.7 | 19 |
| 49 C.F.R. §396.4 (1979) | 19 |

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## BRIEF FOR RESPONDENT

### STATEMENT OF THE CASE

The petitioners' statement of the case is substantially complete except as modified herein: The grievance filed by the petitioner, Barrentine, stated, *inter alia*:

> "Federal Wage Laws also state that this is compensable time." (J.A. 21)

The respondent has not and does not concede that the FLSA claim of the employees was not submitted to or considered by the Grievance Committee. To the contrary, the respondent's position is that such claim was

submitted to and considered by the Grievance Committee and was determined in favor of the respondent.

The trial court reviewed the grievance proceedings *de novo* and concluded that the proceedings were fair and that the union had not failed in its duty of fair representation to the petitioners. (Pet. App. 12a)

The trial court took into consideration in its affirmance of the decision of the Grievance Committee[1] that a Central States Grievance Committee in a similar case involving East Texas Motor Freight also held the D.O.T. safety inspection time non-compensable. (Pet. App. 11a)

## SUMMARY OF ARGUMENT

There is a strong federal policy, both congressional and judicial, which has historically held that the settlement of labor disputes by arbitration, where the parties have provided by contract for the arbitration of disputes, is to be supported and encouraged by specific enforcement of the arbitration clauses. Claims for wages arising under the Fair Labor Standards Act have not been excluded from this broad federal policy except for the aberrational decision of *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971).

In order to meet the reasonable expectations of all parties to a collective bargaining agreement, judicial support and enforcement of the terms of a collective bargaining agreement in the area of wages and hours should be encouraged by this Court. A doctrine which permits any party to a labor contract multiple oppor-

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[1] This Grievance Committee is a Southern States Committee.

tunities to litigate the same factual question without a binding resolution encourages litigation and promotes instability and increases the potential for labor disputes and unrest and is contrary to public policy.

Safety inspections which Congress has determined are the responsibility of employees and which Congress has removed from the control of the employer do not constitute "time worked" for the purposes of the FLSA. Congress has chosen to place the financial burden (although *de minimis* it is) of the Department of Transportation safety inspection on the shoulders of the employees rather than the employers.

The failure of the petitioners to comply with the requirements of 29 U.S.C. §216(b) and 29 U.S.C. §256 is fatally defective to their claims. Since none of the petitioners filed written consents to the maintenance of the action, this action has not been properly commenced and the petitioners are not properly parties.

### A. The Decision Below Properly Reflects The Federal Labor Policy Of Encouraging Labor Peace By Enforcing Arbitration Provisions Of Collective Bargaining Agreements.

There is no more basic labor dispute than one arising out of wages and hours. There is a strong federal policy favoring arbitration as the means of resolving labor disputes. This policy manifests itself in Section 203 of the Labor Management Relations Act of 1947, 29 U.S.C. §173(d) which provides, *inter alia*:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.. . ."

Strong judicial support of this congressional policy has been evidenced by the courts for approximately forty (40) years.

The judicial support for the policy has not in the past been limited or bifurcated as the Petitioners and Amicus now urge the Court. Historically, the judicial approach has been to hold that the arbitration process is adequate to resolve wage claims based on the FLSA.

In *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943), the plaintiff employees sued the employer under the FLSA seeking recovery of amounts alleged to be due them for overtime work for which they claimed they had not been paid and were entitled to by virtue of the FLSA. The contracts under which the employees were employed contained a provision for arbitration of "any difficulty or disagreement "* * * growing out of the relations of employers and employed." *Donahue, supra*, at page 4. One of the specific issues raised was whether the arbitration clause could be applied where the plaintiff's claim was one to recover damages under the FLSA. The *Donahue* Court in analyzing the issue, at page 6, stated:

> "Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language.. . .
>
> "We think the terms of the contract in this case are broad enough to cover the claim in litigation. And we see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims arising under it. No doubt it creates rights

which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the Act and a claim based on a contract, — each is based on a legal right which the claimant asserts against someone else. Arbitration is one way by which such a right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort.

"Here again we should not choke the arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions."

In *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948), the suit by the employees, members of the United Mine Workers, was to recover regular and overtime wages, liquidated damages, attorneys' fees and costs under the FLSA. Additionally, they sought to have the collective bargaining agreement, itself, declared illegal as being in violation of the FLSA, *Evans, supra*, at page 972. The employer filed an application for stay pursuant to Section 3 of the United States Arbitration Act. The trial court held that the issues raised were referrable to arbitration pursuant to a contractual arbitration clause and the plaintiffs appealed. In holding that both issues were referrable to arbitration, the Court said at page 973:

"We concluded by stating, and this was the gist of our decision presently applicable to the instant case, that the questions of the days and hours on which a claimant worked and "the calculation of the amount of money to which he may be entitled under the (Fair Labor Standards) Act. * * *" is the kind of problem which is properly referable either

> to a special master or an arbitrator and that since the parties by contract had provided for arbitration the reference to arbitration was entirely appropriate."

See further at page 974 where that Court said:

> "It was not our intention to indicate that the arbitrators could not inaugurate and put into effect a new, proper and legal formula in lieu of that presently contained in Section 7 to the end that the requirements of the Fair Labor Standards Act might be effected. Our intention in fact was to the contrary."

This judicial support was reinforced by this Court in *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912 (1957) at page 915 where the Court said:

> ". . . 301(a) is more than jurisdictional . . . and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."

And also at page 919 as follows:

> "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of §7 of the Norris-LaGuardia Act."

And also in the United Steelworkers trilogy, see *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 80 S.Ct. 1347; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

In *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir. 1964), the employees, represented by the United Brotherhood of Carpenters and Joiners of America, performed services for their employers pursuant to a collective bargaining agreement which contained the following language at page 496:

> "All grievances or disputes, other than jurisdictional disputes, arising out of the interpretation or application of any of the terms or conditions of this Agreement shall be submitted for determination and shall be determined by the procedure set forth in Article V, * * *."

The collective bargaining agreement further provided that the employees would travel to and from work on their own time and by their own means of transportation, *Beckley, supra*, page 496, and otherwise contained provisions for wage rates, working hours overtime pay and similar matters. The employees filed suit under the FLSA claiming that they had performed certain overtime work but for which no additional overtime compensation was paid. They contended the time spent by them in traveling to and from their work site constituted hours worked under the FLSA notwithstanding the contract provisions. They argued that the question of whether the FLSA had been violated was not proper for arbitration. See *Beckely, supra*, page 496:

> "Appellants support such contention by arguing that whether the time spent by them in travelling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair

Labor Standards Act which precludes arbitration of claims arising under it. We have found none. As stated in *Donahue* v. *Susquehanna Collieries, supra*, 138 F.2d at page 6:

> "We may concede that Congress could have done so had it wished. It could have provided that any claim under the Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language."

> "(2) It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

In *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965), page 616, this Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey* v. *Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *National Labor Relations Board* v. *Miranda Fuel Co.*, 2 Cir., 326 F.2d172.* * *
>
> * * *
>
> "A contrary rule which would permit an individual employee to completely sidestep available

> grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters etc.* v. *Lucas-Flour Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 577, 7 L.Ed.2d 593."

The *Republic Steel Corp.* Court then went on to analyze whether or not the employee's claim for severance pay fell within the general federal rule described above or was so different as to justify an exception. The Court concluded that the severance pay was not substantially different from any other claim so as to justify an exception. The reason for treating the severance pay as any other type of grievance was based on the Court's rationale that as long as the decision would effect the future relations between the employer and other employees, the contract method agreed upon should be given support by the courts. See *Republic Steel Corp., supra*, at page 618:

> "Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship."

And continuing further at page 618:

> "If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that

> could be used against him could do so only by eliminating contract grievance procedures for severance-pay claims."

Continuing at page 618:

> "There are, then, positive reasons why the general federal rule should govern grievances based on severance claims as it does others. Furthermore, no positive reasons appear why the general federal rule should not apply. "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills," and "the subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.'" *Local 174, Teamsters etc.* v. *Lucas Flour Co.*, 369 U.S., at 103, 82 S.Ct., at 576."

The question of pay presented in the instant case falls squarely within the rationale of the general federal rule in that all employees, present and future, performing the safety check are and would be concerned as to the outcome of the dispute, and so long as the Department of Transportation requires the safety check, the time in question would remain a potential cause of dispute.

From at least 1943 until 1971, the judiciary had consistently followed the policy of permitting, nay requiring, FLSA claims to be determined by arbitration where the collective bargaining agreement contained such a clause. It was not until the case of *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 91 S.Ct. 409 (1971), that this Court departed from the established line of decisions in mid-stream and in a sharply divided opinion, concluded that the Labor Management Relations Act did not require arbitration of wage claims but was merely an alternative method.

The respondent submits to the Court that the *U.S. Bulk Carriers* decision was an unwise departure from the prior decisions of this Court. The dissenting opinion in *U.S. Bulk Carriers* more accurately analyzed the policy of encouraging settlement of labor disputes through the use of the grievance procedure in those instances when the claim of the employee is based on a federal wage statute.

As pointed out in the dissent in *U.S. Bulk Carriers, supra*, page 419:

> "The merits of respondent's nonstatutory claims depend entirely on interpretation and application of the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials . . . and (c) whether the ship had arrived "inport" . . .
>
> "Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If it develops that petitioner had paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.
>
> "These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful

in assessing the validity of the claims. This familiarity is, of course, one of the prime attributes of an arbitrator."

Further, at page 421 of the dissent:

"Nor until now has there been any principle that requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues that are cognizable under the arbitration clause."

And at page 422:

"The effect of this is to hold contractual remedies enforceable by the employee but not by the employer. This is not only a curious application of §301 and contract principles but an unwise departure from past cases. In *Republic Steel Corp.* v. *Maddox, supra*, the Court foresaw that under such circumstances the employer, "to limit the modes of redress that could be used against him," would simply insist in future bargaining that suits for overtime pay be eliminated from the grievance procedure."

Further at page 422:

"Nothing in the words of the statute warrants dispensing with contractual procedures. Section 596 provides that the penalty "shall be recoverable *as wages* in any claim made before the court." (Emphasis added.) The statute on its face makes the penalty a wage claim; it would in no way be in derogation of the statute to require this claim to be presented like any other wage claim. Under the principles of *Republic Steel Corp.* v. *Maddox, supra*, this means that the internal remedies must first be exhausted.

"Even assuming without conceding that §596 provides a direct route to federal courts on penalty

> claims, §301 should at least require that the contractual bases for the penalty claim be settled by contractual methods before penalty claims may be adjudicated by the courts."

The Court should return to the principles of *Republic Steel Corp.* v. *Maddox* and put to rest once and for all the uncertainty which has resulted from *U.S. Bulk Carriers, Inc.*

*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) does not conflict with or represent a departure by the Court from any of the theories or doctrines set forth above. *Alexander* is no more or less than a determination by this Court of the relative weight in the social structure of the country to be given the strong federal policy favoring arbitration of labor disputes and the (as was ultimately determined) even stronger federal policy of judicial examination of race discrimination. There is no "law of the shop" to aid an arbitrator or upon which an arbitrator could base a decision concerning race discrimination. The determination of what conduct is or is not discriminatory is not and never has been dealt with on a contractual basis. Although all employees and their union representatives can safely be assumed to be militantly interested in the protection of wages and hours, no such assumption can be made with respect to protection from racial discrimination. Indeed, the unions themselves have fostered race discrimination in the past. There is just no rational basis for attempting to equate a claim of race discrimination with a claim for nonpayment of wages. The reason for the Congressional policy favoring settlement by arbitration was to promote industrial peace. That policy was not intended to be used to protect the civil rights of individuals. The two pro-

blems being different, it is rational to use different solutions. As this Court points out in *Alexander, supra*, page 1023:

"The purpose and procedures of Title VII indicate that

> Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."

But in the case of *Employees of Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614, this Court held that there is no such congressional intent in the case of contract disputes which are based on FLSA requirements.

The approach of the 10th Circuit Court of Appeals in *Satterwhite* v. *United Postal Service, Inc.* 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1975) represents a return to the rational policy of "comprehensive uniformity" described in *Maddox, supra* and should be adopted by this Court. *Satterwhite, supra*, page 450, correctly analyzes the relationship of the federal wage statutes and the antiracial discrimination statutes in light of the policies of the United States favoring arbitration of labor disputes:

> "The acceptance of the Court's analysis and reasoning in Gardner-Denver does not solve our problem unless we equate the wages and hours provisions of FLSA with the antidiscrimination provisions of Title VII. Strong national policy is expressed both in Title VII, 94 S.Ct. at 1019, and in FLSA, see 29 U.S.C. §202, and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707, 65 S.Ct. 895, 89 L.Ed. 1296. These policies, each in its turn, should be balanced against the federal policy favoring arbitration of labor disputes.

"In a number of respects FLSA is importantly different from Title VII. Gardner-Denver refers to the significant role of private individuals in the enforcement of Title VII rights . . . . In *Empolyees etc.* v. *Department of Public Helath and Welfare of Missouri*, 411 U.S. 279, 286, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251, the Court said that, "* * * private enforcement of the (FLSA) was not a paramount objective * * *." The independent statutory remedies in Title VII evince an intent to accord parallel or overlapping relief apart from contractual processes. The absence of such procedures in FLSA suggests a greater reliance on contract remedies and a lesser emphasis on individual enforcement.

". . . It established the defense of good faith reliance on administrative regulations . . . and declared the congressional policy "to protect the right of collective bargaining and * * * limit the jurisdiction of the courts." . . . The point is that in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions.. . . The Portal-to-Portal Act speaks to the protection of collective bargaining. Gardner-Denver says that . . . "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements." The different approach to the defense of good faith and the different emphasis on collective bargaining indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment."

And further at page 451:

"Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. *Gardner-Denver* says, 94 S.Ct. at 1024, that

> "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," and that "judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in *Gardner-Denver* that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," 94 S.Ct. at 1024 n. 19, has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members."

And further at page 451:

> "The ever-present disputes over wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."

The *Satterwhite, supra*, decision has been favorably received by the judiciary beginning with the District Court of Puerto Rico in *International Longshoreman's Association* v. *Sea Land Services*, 430 F. Supp. 282 (F.R. 1975), where the District Court required an employee seeking overtime to first pursue his arbitration remedies. In relying on *Republic Steel, supra*, and *Satterwhite, supra,* that Court held:

> "It has no jurisdiction over matters that are arbitral under collective bargaining agreement . . ." *Id.* at 284.

Plaintiff's cause of action was dismissed.

In *Union de Tronquistos de Puerto Rico, Local 901* v. *Flagship Hotel, Corp.*, 554 F.2d 8 (1st Cir. 1977), the First Circuit interpreted a minimum wage regulation of Puerto Rico, which the Court assumed for the purpose of its decision, was compatible with the purposes of federal labor law, *Id.* at pages 10-11. The employees in *Union de Tronquistos* had submitted their claim to the arbitration process but being dissatisfied with the result filed suit in federal court. After an analysis and comparison of the rationale of *Alexander* v. *Gardner Denver* with *Satterwhite* v. *United Postal Service, Inc.*, the Court stated that in its opinion:

> ". . . *Satterwhite* was correctly decided and is *a fortiori* controlling here." *Id.* at page 11.

And went on to hold that:

> "We are convinced that the policy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement. The high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay. The reassertion in a judicial forum of the same wage claim determined in an appropriate arbitration hinders rather than promotes industrial peace, and should not be permitted." *Id.* at page 12.

See also *Atterburg* v. *Anchor Motor Freight, Inc.*, 425 F. Supp. 841 (D.N.J. 1977) wherein the District Court of New Jersey held that the submission of a dispute to arbitration pursuant to a collective bargaining contract, without protest until after the arbitrators' decision, constituted consent by the parties to abide by the final determination. Once in arbitration, the FLSA cause of action is foreclosed unless proof exists of the

union's breach of duty of representation or the employer's repudiation of the contract. *Id.* at 844.

The trial court in the instant case reviewed the grievance committee proceedings and found them to be fair:

> "If the Grievance Committee had been shown to have been influenced by fraud or impropriety, or if the Union had failed in its duty of fair representation to these employees, or if, perhaps, the decision was so clearly contrary to the language of the contract that some impropriety could be inferred, then the bar of finality attaching in this contract to the Grievance Committtee's decision could be voided. The Court finds that none of these requirements is met here." (Pet. App. 12a)

Contrary to the position taken by the United States in its brief as *Amicus Curiae* at page 19, note 11, the time in question is not compensable under the FLSA, regardless of the decision of the grievance committee.

In *Tennessee Coal Iron R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944), this Court established a three-pronged test for determining hours worked for FSLA purposes: (1) The activity must require physical exertion; (2) The exertion must be controlled by the employer; and (3) The exertion must be pursued necessarily and primarily for the benefit of the employer and his business. See *Tennessee Coal Iron R.R. Co.* v. *Muscoda Local No. 123, supra*, 321 U.S. at 703.

The requirement for and elements of the safety inspection are dictated by the requirements of the Federal Motor Carrier Safety Regulations, 49 C.F.R. §§390, *et. seq.*, promulgated by the U. S. Department of Transportation under the authority of the Interstate

Commerce Act, 49 U.S.C. §304. The requirement that the inspection be made by the driver, not the company, is set forth in 49 C.F.R. §§392.7 and 396.4 (1979). The Department of Transportation inspection was not controlled by the employer but was performed at the discretion of the employees as to time and manner. The items to be inspected were established by the Department of Transportation and not by the employer. Nothing was added to the inspection and only those items required by the Department of Transportation were checked by the drivers. As pointed out by the 8th Circuit in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F. 2d 1194 (1980) at page 1201, the inspection was not for the exclusive benefit of the employer as required by *Tennessee Coal, supra*, but rather:

> "After all, the policy is designed for the welfare of the drivers as well as for the benefit of employers and third party members of the traveling public."

In *Leone* v. *Mobil Oil Co.*, 523 F. 2d 1153 (D.C. Cir. 1975), that Court of Appeals had occasion to interpret and apply the *Tennessee Coal* doctrine in a case involving the application of the FSLA time spent by employees participating in OSHA inspections. In analyzing the three-pronged test, that Court said at page 1163:

> "In applying the *Tennesse Coal* test that the activity be controlled by the employer and primarily for his benefit, we find that employees accompanying an OSHA inspector fail to satisfy either requirement. It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer and are not worktime activities under FLSA.. . ."

Thus, the employees' claim must fail under the doctrine of *Tennessee Coal, supra.*

Additionally, 29 U.S.C. §254, the Portal-to-Portal Pay Act provides that no employer shall be subject to any liability under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act on account of the failure of the employer to pay an employee the minimum wage or to pay an employee overtime compensation for any activities which are preliminary or postliminary to the principal activities of the employee, if same occurs on or after May 14, 1947. The principal activities of the petitioners consist of driving trucks loaded with freight in interstate commerce. Inspection of the vehicles driven by the plaintiffs are preliminary to such principal activities.

Article 50 of the Collective Bargaining Agreement in the instant case provides, *inter alia*:

> "All employees covered by this agreement shall be paid for all time spent in the service of the employer."

This requirement for payment is even more broad than the requirement of 29 U.S.C. §206(b). The threshold determination by the grievance committee which had to be made was whether or not the time involved in performing the D.O.T. safety check was spent in the service of the employer. That decision required the specialized knowledge, expertise and familiarity with the law of the shop possessed so uniquely by arbitrators. Having determined that the time was not spent in the service of the employer, not only did the contractual claim under Article 50 fail, but the underpinning for the statutory claim was removed as well.

In order for the time to be compensable under the FLSA, the three-pronged test of *Muscoda, supra*, had to be met. Once the factual issue as to the nature of the time was resolved by the finding that it was not spent in the service of the employer, the doctrine of *Muscoda, supra*, provides the basis for the termination of the legal claim under FLSA. Implicitly, this is the holding of the *Satterwhite, supra*, Court at page 452:

> "We hold that when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA §16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator. We are convinced that the policy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement."

**B. The FLSA Claim Of The Employees Is Barred And Is Not Properly Before The Court Because Of The Failure Of The Employees To Comply With The Requirements Of The 29 U.S.C. §216(b) and 29 U.S.C. §256.**

None of the employees signed the complaint and none of the employees signed a written consent as required. The employer raised this defect in its answer (J.A.3) and has consistently raised the issue throughout these proceedings. 29 U.S.C. §216(b) provides, *inter alia*:

> "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

29 U.S.C. §256 requires that for any action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, that the action shall not be considered to be commenced as to a collective action until:

> "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> "(b) if such written consent was not so filed or if his name did not so appear — on the subsequent date on which such written consent is filed in the court in which the action was commenced."

The case of *Burrell* v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951) was an action under the FLSA to recover unpaid minimum wages. The complaint named 32 individuals as plaintiffs; however, only one of the named plaintiffs signed the complaint. The 31 other plaintiffs did not sign the complaint and did not file separate written consents to become parties to the action. Although initially the plaintiffs sought relief on behalf of all others similarly situated, the attempt to make the action a class action was abandoned prior to trial and the matter proceeded limited to the 32 named parties. The trial court held that the action was a "collective action" for the purposes of 29 U.S.C. §256 and that the filing of the complaint was not a sufficient commencement of the action to stop the running of the statute of limitations as to the 31 plaintiffs who did not sign the complaint or file separate written consents. Accordingly, the action was dismissed as to the 31 named plaintiffs and only the single plaintiff who executed the complaint was permitted to proceed.

In *LaChapelle* v. *Owens, Illinois*, 513 F. 2d 286, 288 (5th Cir. 1975), that Court of Appeals contrasted 29 U.S.C. §216(b) with a class action under Fed. Rules of Civ. Proc. Rule 23 as follows:

> "Under §16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent. *Sims* v. *Parke Davis & Co.*, 334 F.Supp. 774, 780-81 (E.D.Mich.) aff'd 453 F.2d 1259 (6th Cir. 1971) cert. denied 405 U.S. 978, 92 S.Ct. 1196, 31 L.Ed.2d 254 (1972).. . ."

In *Grosheck* v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977), an action under 29 U.S.C. §216(b) of the FLSA, a single plaintiff filed suit, executed a complaint and filed his written consent to the action. More than three years after the filing of the suit (and after the statute of limitations had expired), 119 additional employees tried to join the action by filing their written consents. The Court held that 29 U.S.C. §256 required the written consent to be filed within two (2) years of the accrual of the cause of action in order for the action to be considered as commenced. Since the additional plaintiffs had not filed their written consents within two (2) years of the accrual of the class action, the Court held the claims were barred and dismissed the 119. The trial court refused to permit the additional employees to join notwithstanding the effect of the refusal was to totally barr the claims of the other employees stating at page 233:

> "The 119 individuals who have filed written consents to the maintenance of this action did not submit their consents with the complaint. The only individual who has consented to the action . . . is the

> named plaintiff. Under §216(b), the named plaintiff, then, is the only plaintiff in this action . . ."

In *Sims, et al* v. *Parke Davis & Company*, 453 F. 2d 259 (6th Cir. 1971) cert. den. 405 U.S. 978 (1972), the 6th Circuit, in affirming the trial court's denial of the plaintiff's claims for minimum wage under the FLSA, adopted the reasons stated by the trial court in 334 F. Supp. 774, (1971):

> ". . . that the plaintiffs not filing written consents can neither benefit from nor be bound by any judgment . . ." *Id.* at 781.

See also *Kulik* v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (Ed.Ill. 1962), an FLSA case in which the plaintiffs attached a typed document listing the persons who purportedly had consented to the action. The typed list lacked the individuals' actual signatures. Although the plaintiffs subsequently filed written consents, the Court refused to permit the written consents to relate back to the date the complaint was filed. In dismissing those claims the Court held "no document with the name of a person thereon satisfies the requirement of 29 U.S.C. §256, unless the typewritten name is proved to be the signature of and by that person." *Id.* at 941.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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